

118 74-2413
11 November 1974

MEMORANDUM FOR: Legislative Counsel

SUBJECT : H.R. 16373 - Right of Privacy Bill

REFERENCE : Memorandum for General Counsel from
Acting Legislative Counsel dated 29 October
1974, same subject

1. You have requested the opinion of this Office concerning the adequacy of the Agency's exemption from the provisions of H.R. 16373, a bill to amend Title 5 U.S.C. "by adding a section 552(a) to safeguard individual privacy from the misuse of Federal records and to provide that individuals be granted access to records concerning them which are maintained by Federal agencies." Actually, the bill does not exempt the Agency as such. Rather, it allows heads of agencies to promulgate rules to exempt certain kinds of records. This unusual procedure transfers what in many cases will be unpopular exemption decisions from Congress to the agency head. The exemptions read as follows:

(j) GENERAL EXEMPTIONS. - The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of section 553 of this title, to exempt any system of records within the agency from any part of this section except subsections (b) and (e)(2)(A) through (F) if the system of records is -

(1) maintained by the Central Intelligence Agency;

* * *

(k) SPECIFIC EXEMPTIONS. - The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of section 553 of this title, to exempt any system of records within the agency from subsections (c)(3), (d), (e)(2)(G) and (H), and (f) of this section if the system of records is -

(1) subject to the provisions of section 552(b)(1) of this title;

* * *

Section 552(b)(1) concerns matters classified pursuant to Executive Order in the interest of national defense or foreign policy.

2. It should be noted that both exemptions provide that agency rules which exempt any system of records must be promulgated in accordance with the requirements of 5 U.S.C. § 553, the section of the Administrative Procedure Act (APA) on rule making. Those requirements generally are notice of proposed rule making, opportunity for interested parties to be heard, and publication of the rules at least 30 days prior to their effective date. However, section 553(a) provides that "t/his section applies, according to the provisions thereof, except to the extent that there is involved (1) a military or foreign affairs function of the United States...." The first question posed by your referent memo is whether insertion of language in the conference report that section 553(a)(1) would apply to agency rule making will effectively incorporate that section in the legislation.

3. If the language of a bill is clear and unambiguous, a court will not look to legislative history. The question in this case is whether the privacy bill's language which incorporated the APA provisions on rule making includes the section 553(a)(1) exemption from rule making. The bill provides that agency rules which exempt records must be promulgated "in accordance with the requirements of section 553 (emphasis added)." Section 553(a)(1), the subject of your inquiry, is not a requirement of section 553, but rather an exception to the requirements. Thus, the bill seems to specifically avoid incorporation of the exceptions to rule making in section 553(a). This conclusion is supported by two factors other than the plain meaning of the words:

a. The drafters could have easily incorporated the exceptions to rule making in section 553 by using the language "in accordance with the provisions of section 553" or "pursuant to section 553" instead of "in accordance with the requirements of section 553";

b. The fact that the committee staff recognize a need for clarification indicates that the exemptions are poorly drafted and ambiguous.

Thus, it is the opinion of this Office that insertion of legislative history in the conference report will, in all likelihood, not be effective to incorporate the section 553(a) exceptions to rule making if this issue is raised in court. However, since a court could find the bill's language ambiguous, an attempt to obtain legislative history that section 553(a) exemptions apply would be worthwhile.

4. While the Agency may not be exempt from section 553's rule making requirements, the procedure to be followed thereunder is not very onerous. The notice of proposed rule making required to be published in the Federal Register must set out the particulars in accordance with section 553(b). Section 553(c) allows interested persons to submit written views, "with or without opportunity for oral presentation." An actual public hearing pursuant to 5 U.S.C. § 556 is not required by the bill. Section 553(d) requires a minimum 30-day advance publication of the rule, and 553(e) requires that interested persons be given the right to request "issuance, amendment, or repeal of a rule."

5. Unless the Agency is able to obtain an exemption from the substantive provisions of the bill which eliminates the requirement to publish rules to obtain exemption, the Agency will likely find itself in Federal court on the rule making issue. If a specific exemption for CIA is not possible, the bill's language should be clarified to indicate whether or not the Agency must follow the rule making procedure of section 553 of Title 5.



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